

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Cr. No. 10-2734 JH

JOHN CHARLES McCLUSKEY,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on various written motions that either have been rendered moot by events in the trial, or have been ruled upon in open court.

First, two motions by the Government relating to the admissibility of evidence to be offered by the Defendant during the trial phase of this case are moot, as the Defendant elected not to present any of the evidence that is the subject of the motions. The motions relate to the admissibility of the testimony of Defendant's expert witness William Tobin, as well as various witnesses who would testify regarding the credibility of Tracy Province.

On September 27, 2013, the Government filed its motion to exclude any jury instructions on lesser included offenses. The Court, after taking the matter under advisement, granted the motion in part and concluded that there was not sufficient evidence to support a lesser included offense of manslaughter on any count of the Third Superseding Indictment. However, the Court denied the motion in part and concluded that the record contained sufficient evidence to support a charge of second degree murder. Accordingly, the Court included instructions regarding second degree murder within the Court's Instructions to the Jury, which it read to them in open Court on September

30, 2013. The Government made no objections to the Court's instructions.

IT IS THEREFORE ORDERED that:

- (1) *United States' Motion to Exclude Defendant's Unnoticed Expert Witness William Tobin* [Doc. 1261] is **DENIED AS MOOT**;
- (2) *United States' Motion to Exclude Defense Witness Testimony Inadmissible Under the Federal Rules of Evidence and Request that Court Demand Proffer Outside Presence of Jury* [Doc. 1265] is **DENIED AS MOOT**; and
- (3) *United States' Motion to Preclude Lesser Included Offense Jury Instructions* [Doc. 1275] is **GRANTED IN PART** and **DENIED IN PART** as explained herein.


UNITED STATES DISTRICT JUDGE